85-279

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1985

AMERICAN PETROFINA COMPANY OF TEXAS,
Petitioner,

v.

OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION LOCAL NO. 4-23, et al.,
Respondents.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

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QUESTIONS PRESENTED

I. Whether an employee discharged for picket-line violence during an economic strike remains a company employee because of the National Labor Relations Act, until his status is adjudicated otherwise.

II. Whether an arbitration provision in an expired collective bargaining agreement continues to protect an employee discharged by a company for picket-line violence.

STATEMENT REQUIRED BY RULE 28.1

Petitioner American Petrofina Company of Texas is a wholly-owned subsidiary of the parent company American Petrofina, Incorporated.

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For The Fifth Circuit

OPINIONS BELOW

The opinion of the Court of Appeals is reported *sub nom. Oil Chemical & Atomic Workers International Union Local No. 4-23 v. American Petrofina Co.*, 759 F.2d 512 (5th Cir. 1985), and is reproduced in the Appendix to this Petition at page A-1. The opinion of the District Court is reported in 586 F. Supp. 643 (E.D. Tex. 1984), and is reproduced in the Appendix to this Petition at page A-7.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 6, 1985. Petitioner filed a timely

Petition for Rehearing, which was denied in an Order dated June 4, 1985, reproduced in the Appendix to this Petition at Page A-17. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The following provisions of the National Labor Relations Act, 29 U.S.C. § 152(3), 160(c), and 185(a) (1982), provide in pertinent part as follows:

> **Section 2(3) of the Act:**
> The term "employee" shall include any employee ..., unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute. . . .

29 U.S.C. § 152(3).

> **Section 10(c) of the Act:**
> . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause, . . .

29 U.S.C. § 166(c).

> **Section 301(a) of the Act:**
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

STATEMENT OF THE CASE

This case presents the Court with an opportunity to rule

on two points critically important to labor law: 1) the validity of the so-called *Fansteel* Doctrine, and 2) the proper application of arbitration provisions in expired collective bargaining agreements. At issue first in this case is the proper balance between the right of economic strikers to be free from reprisal for striking, versus the right of a company to discharge a striker for acts of violence which are not protected by the National Labor Relations Act ("the Act").

The District Court properly followed this Court's decisions in *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), and *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953), in deciding that the discharge took effect in May 1982, at the time of the Company's announcement thereof. The Fifth Circuit reversed, articulating a principle new to the field of labor law: an economic striker cannot be terminated during a strike unless and until so adjudicated. Thus the employee remained an employee until the end of the strike on December 20, 1982. Since he was an employee when a new agreement was executed, he was therefore covered by the arbitration clause of the new agreement. The correct resolution of this question has a profound effect on the relationship of any company and its employees engaged in a strike. It changes the degree of protection afforded strikers by the Act, and creates an immunity from company actions, no matter how valid the company's cause for discharge, until an "adjudication" later determines the employee's status.

In the instant case, American Petrofina Company of Texas ("Fina" or "Company") and the Union had been parties to a collective bargaining agreement for many

years. Strikes were not uncommon when such agreement terminated. The events leading up to the present litigation were accurately described in the Trial Court's Memorandum Opinion ("Opinion"). They are adopted and for convenience set forth as follows:

> The facts in this case are undisputed. In late 1981, the war clouds were gathering at the Fina Refinery in Port Arthur, Texas. A collective bargaining agreement between the Company and Local 4-23 of the O.C.A.W. provided that the agreement would stay in effect through midnight January 7, 1982 unless either party served notice to the other "not less than sixty days prior to the desired termination date." On November 1, 1981, the Union served the required notice on Fina that it would terminate the said agreement at 12:01 a.m. on January 8, 1982. Negotiation occurred in an attempt to avert the walkout, but to no avail. On January 8, 1982, the Union struck Fina.
>
> Picket lines were set up, which Union employees refused to cross. The Plant, however, continued to operate with its management personnel. The situation was undeniably tense and ugly. On February 20, 1982, an incident occurred on the picket line involving Hildabridle and several company guards. The guards alleged that in the middle of an argument Hildabridle had pulled a knife and threatened them. The police were called and the matter was investigated. Charges were filed against Hildabridle, though no conviction resulted.
>
> The company investigated the incident and concluded that it was serious enough to warrant disciplinary action against Hildabridle. The company wrote O.C.A.W. officials and Hildabridle to inform them of the investigation and attempted to schedule an informal hearing with Hildabridle to hear his side of the events. The only answer the company received was a letter from Hildabridle's attorneys protesting the investigation and complaining that Hildabridle

would not attend any hearing unless his attorneys could be present. The attorneys also made a statement in their letter that has returned to haunt them. Referring to the company's proposal for a hearing, the attorneys stated "as we all are aware, the labor contract expired at 12:01 a.m. on January 8, 1982. *Upon its expiration, the grievance and arbitration procedure also expired* [emphasis by the Court].

After some further futile correspondence between the parties, the Company acted on its own. After reviewing the evidence, the Company concluded that Hildabridle should be discharged. This decision was made after a meeting of Company officials and was basically the decision of the Company's Vice-President of Employee Relations. Thereafter, by a May 27, 1982 letter, the Company informed Hildabridle that he was terminated as of that date.

The Union then took steps to reinstate Hildabridle. Unfair Labor Practice charges were filed against the Company with the National Labor Relations Board, contending that Hildabridle's discharge was the result of his union activity. The N.L.R.B. refused to act on this charge at both the regional and national level, and eventually the charge was dismissed.

Meanwhile, negotiations to end the strike began. In the final discussions that accompanied the strike's settlement, the Company and the Union discussed Hildabridle's discharge. The Union wanted the plaintiff reinstated; or, if the Company would not agree to this, to have the matter arbitrated. The Company refused both requests. Instead, the Company and the Union agreed to disagree. Within the "Return to work understanding" executed by the O.C.A.W. and Fina in settlement of the strike, a specific clause outlined the parties' conflicting positions on the Hildabridle discharge, leaving the matter to future resolution.

On December 20, 1982, the Union went back to work. That same day, the Union filed a grievance under the *new* contract claiming Hildabridle had been terminated without just cause. Once again, the

> Company refused to arbitrate the matter. Thus, the Union and Hildabridle brought suit in this Court.

Opinion, page 2-5 (footnotes omitted).

At the time the new agreement was reached, the Company and the Union also negotiated a "Return to Work Understanding" dealing with many details concerning the returning employees and Mr. Hildabridle (Union Exhibit 8). In paragraph 6 of the agreement, the Company and Union agreed to dismiss any pending action against the other, but that paragraph went on to state: "This paragraph does not apply to grievances or suits brought by the Union on behalf of individual employees to enforce the arbitration provisions." This exception to the dismissal of actions was specifically aimed at the Hildabridle dispute. In paragraph 8 the parties specifically preserved their rights as to the prior disciplinary action:

> No disciplinary action will be taken by the Company against any Employee for actions taken during the strike unless that Employee has been advised of such action prior to the date of this Agreement or unless Disciplinary Action is taken under paragraph 9. As to disciplinary action previously taken during the strike, both the Company and Union preserve their positions as to the application of the grievance procedure. The Union's position is that such action is subject to the grievance and arbitration provisions and the Company's position is that it is not.

Union Exhibit 8, page [2].

The Trial Court made specific findings that these clauses related to the disciplinary action taken against Hildabridle during the strike (Opinion, page 5). Each of the parties negotiated over Hildabridle's status and sought to obtain a settlement in its favor. To settle the

strike and return the other employees to work, they ultimately agreed to let arbitrability of the discharge be decided by a court. As the Trial Court categorized it, there was no agreement to arbitrate Hildabridle's discharge, rather there was "an agreement to disagree" about it, knowing that a lawsuit would result. The issue in that suit was whether the action previously taken against Hildabridle was arbitrable under *Nolde Brothers, Inc. v. Local No. 358 Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977) (holding that, as to severance pay, an arbitration clause survived the termination of the underlying collective bargaining agreement).

The District Court further held *Nolde Brothers* distinguishable from the present case, reasoning as follows: *Nolde Brothers* involved employee benefits, which could have been intended to survive the termination of an agreement. Conversely, the present case involved a discharge, with all events leading to the discharge, as well as the discharge action itself, taking place after the termination of the agreement. The District Court thoroughly analyzed all decisions subsequent to *Nolde Brothers*, prior to reaching its conclusion.

The Fifth Circuit did not address the issue of arbitrability under the expired collective bargaining agreement. It ruled as a matter of law that, regardless of the Company's discharge action in May of 1982, Hildabridle, as an economic striker, remained an employee until December 1982. The Fifth Circuit concluded that since the termination had not been "adjudicated" that Hildabridle was discharged prior to the execution of the new collective bargaining agreement, he was, as a matter of law, covered by it. The Court disregarded the intent of the parties, as stated in the

Return to Work Understanding, and disregarded the finding of the Trial Court, which stated: "[T]he Company never intended to arbitrate Hildabridle's dismissal, which occurred on the earlier date" (Opinion, page 13). Incredibly, the case cited by the Fifth Circuit for the proposition that an economic striker cannot be discharged for picketline misconduct was this Court's decision, *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). Contrary to the Fifth Circuit's view, that case held that a company's discharge of sit-in strikers took effect *when announced* by the company.

REASONS FOR GRANTING THE WRIT

In this case the Fifth Circuit attempted to rewrite a fundamental principle of labor law established by this Court in *Fansteel* nearly a half century ago. This Court struck a balance therein between the rights of economic strikers and the right of a company to discipline employees. This axiom has exercised its powerful force upon labor relations decisions in the intervening decades. The impact of the Fifth Circuit's new rule on events taking place during a strike cannot be accurately measured or predicted. Since all discipline against striking employees is declared invalid until eventually adjudicated valid, violence, irresponsible conduct, and confusion will be the natural result. The Fifth Circuit's decision will also have an adverse impact on any company and union attempting to settle a strike. This can prolong strikes, and would have done so here had the parties not handled the Hildabridle dispute in the manner they did, which permitted the rest of the employees to return to work immediately.

I. The Fifth Circuit's Decision Is In Direct Conflict With

This Court's Prior Decisions, The Decisions of The National Labor Relations Board And Decisions of the Other Circuit Courts.

The *"Fansteel* Doctrine," originating in 306 U.S. 240 (1939), remains a wise principle meriting this Court's endorsement. The error of the Fifth Circuit came from a misreading of this Court's opinion in *Fansteel*, a principle now deeply embedded in hornbook labor law. A standard publication of the Bureau of National Affairs, Inc., states:

> FANSTEEL DOCTRINE
>
> Rule that strikers guilty of unlawful seizure or possession of the employer's property forfeit the protection of LMRA and may be discharged. The term takes its name from the case (*NLRB v. Fansteel Metallurgical Corp.*, . . .) wherein the U. S. Supreme Court upheld the discharge of sitdown strikers. The doctrine has been extended to cover discharge of strikers guilty of other illegal behavior in the course of a strike.

L.R.X. (BNA) 269.

The Fifth Circuit reversed the *Fansteel* Doctrine by holding as follows:

> To the extent that federal labor law protects his employment, therefore, the striker remains an "employee" until the strike ends. *See NLRB v. Fansteel Metallurgical Corp.*, . . . (*citing*, 29 U.S.C. § 152 (3)). It follows that until there is an adjudication of a company's right to fire an economic striker he remains an employee. Thus, Hildabridle was legally still in the status of an employee when the strike ended and the new contract went into effect.

Oil Chemical & Atomic Workers, 759 F.2d at 515.

The *Fansteel* case arose shortly after the passage of the Act in 1935. Company employees were attempting to form a union and requested bargaining with Fansteel. The

Company resisted, hired a labor spy, refused to bargain with the employees' representatives, and attempted to form a company-dominated union. Some employees engaged in a sit-in strike and physically took over the plant. When the Company attempted to retake possession, a "pitched battle ensued." The Company announced that all sit-in strikers were "discharged" for the seizure of the buildings. Unfair labor practice charges were filed: the Board ruled that the Company had violated the Act and that the purported discharge *did not take effect.* These findings of the NLRB are recited in the Seventh Circuit's opinion, *Fansteel Metallurgical Corp. v. NLRB,* 98 F.2d 375 (7th Cir. 1938). The Board held: "at the outset of the strike petitioner announced that all strikers who remained in the plant were discharged, *but that this did not constitute a discharge in fact, and the strikers at all times remained employees of petitioner.*" *Id.* at 379 (emphasis added).

The issue in question was stated by the Seventh Circuit as follows: "whether petitioner had good cause to discharge the sit-down strikers on February 17, and, if so, did the petitioner at that time discharge them?" 98 F.2d at 381. The Court held that they had been discharged, adding, "This being true, the occupants of the building who were discharged on February 17, *were no longer employees of petitioner, and none of them sustained that relationship again until they were re-employed.* Hence there was no longer a majority of petitioner's employees who were members of that union, and the finding to the contrary is not supported by any evidence." *Id.* at 382 (emphasis added). The dissenting judge would have adopted the Board's argument (and the Fifth Circuit's view in the

present case), that the discharged individuals remained employees throughout the strike. He argued, "The law of the National Labor Relations Act, applied to the facts of the instant case, required the Board, and requires this court, to recognize that the striking employees continued to have the status of employees for the purposes of the Act." *Id.* at 385. No firmer foundation could have been laid for this Court to decide this very issue.

Before the Supreme Court, the contention of the Board remained "(2) That under the terms of the Act employees who go on strike because of an unfair labor practice retain their status as employees and are to be considered as such despite discharge for illegal conduct." 306 U.S. at 253. In response to the Board's argument, the Court stated:

> As respondent's unfair labor practices afforded no excuse for the seizure and holding of its buildings, respondent had its normal rights of redress. Those rights, in their most obvious scope, included the right to discharge the wrongdoers from its employ. To say that respondent could resort to the state court to recover damages or to procure punishment, but was powerless to discharge those responsible for the unlawful seizure, would be to create an anomalous distinction for which there is no warrant unless it can be found in the terms of the National Labor Relations Act. . . .

306 U.S. at 254.

After detailed analysis of its prior decisions, and the history of the Act, the Court then concluded that the Act did not cause such persons to remain employees:

> We think that the argument misconstrues the statute. We are unable to conclude that Congress intended to compel employers to retain persons in

> their employ regardless of their unlawful conduct, — to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work.

306 U.S. at 255.

The Court then agreed with the Seventh Circuit:

> In view of the change in the situation by reason of the valid discharge of the "sit-down" strikers and the filling of positions with new men, we see no basis for a conclusion that after the resumption of work Lodge 66 was the choice of a majority of respondent's employees for the purpose of collective bargaining.

306 U.S. at 261-62

In other words, since the employees had been discharged at the time of the announcement, there was no basis to conclude that the union still represented a majority of employees. If they had retained their status as employees after the discharge by the employer, the union would have remained the majority representative. Amazingly, the Fifth Circuit cited this case for the proposition that they "remain employees until the strike ends," or until "adjudication."[1]

II. The Development Of Labor Law Has Been Consistent With the *Fansteel* Doctrine.

This Court's conclusion in *Fansteel*, 306 U.S. at 255, that discharged strikers are no longer employees, has been reaffirmed in a variety of subsequent cases, as well as by

[1] The fact that the employees in *Fansteel* were unfair labor practice strikers does not detract from the case, rather it strengthens Fina's argument because such strikers have even greater protection than economic strikers. *NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954). *See, e.g.*, 2 *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act* 1007 (C. Morris 2d ed. 1983).

statutory amendment. In *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers*, 346 U.S. 464 (1953), striking radio technicians distributed derogatory handbills aimed at their employer. The company then discharged the men who distributed the handbills. This Court upheld the Board's finding that the discharge was for proper "cause" under Section 10(c) of the Act, which provides:

> No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

The Court examined the legislative history of the Act, and its prior decisions, and concluded that such conduct was unprotected by the Act, regardless of whether it occurred during a strike or at any other time. The Court wrote as follows:

> Assuming that there had been no pending labor controversy, the conduct of the "WBT Technicians" from August 24 through September 3 unquestionably would have provided adequate cause of their disciplinary discharge within the meaning of § 10(c) . . . . The fortuity of the coexistence of a labor dispute affords these technicians no substantial defense.

346 U.S. at 476.

Cases have frequently arisen where other types of unprotected activity have resulted in the discharge of an economic striker. *See, e.g.*, 1 *Developing Labor Law, supra*, at 160.

This Court examined the reinstatement remedy itself in detail in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). The Court's analysis of the reinstatement remedy makes

clear that a discharge by the employer terminates the employment at that time, even though the discharge is subject to being set aside later by a reinstatement order of the Board. Reinstatement, however, does not automatically flow from a finding of a violation of the Act. In *Phelps Dodge* this Court stated:

> But even where a worker has not secured equivalent employment, the Board, under particular circumstances, may refuse to order his employment because it would not effectuate the policies of the Act. It has, for example, declined to do so in the case of a worker who had been discharged for union activities and had sought re-employment after having offered his services as a labor spy.

313 U.S. at 194-95 (citation omitted).

The Court went on to discuss why discretion was given to the Board to devise a remedy appropriate to the individual fact situation. The term "reinstatement" itself tells the whole story—the employment relationship is terminated when the company says it is, subject to the company being ordered to "reinstate" it. This decision cannot be harmonized with the Fifth Circuit's conclusion that the "discharged" employee remained an "employee" until he was "adjudicated" otherwise, or until the end of the strike. If such were the case, reinstatement would not even be necessary, since the employee was not terminated at all.

Many cases illustrate the Board's use of discretion in not ordering reinstatement, even after a finding that an unlawful discharge has occurred. Recently, this Court had occasion to review the exercise of this discretion. *Sure-Tan, Inc. v. NLRB*, 104 S.Ct. 2803 (1984). In *Sure-Tan* the company lost a union election. In retaliation it caused some of its employees, who were illegal aliens, to be reported to the

INS. They were immediately deported to Mexico. The Board found this to be a constructive discharge carried out because of their union activity. The difficulty lay in devising a remedy compatible with the immigration laws and the National Labor Relations Act. The Administrative Law Judge, the NLRB, the Circuit Court, and the Supreme Court each had a different opinion as to what the ultimate remedy should be. None, however, took the position taken by the Fifth Circuit that the employees continued to remain employees until adjudicated otherwise. The *Sure-Tan* Court concluded that an offer of reinstatement should be made to the employees, which would be effective upon their legal re-entry into the United States, if this ever occurred. They were deemed "unavailable" for work during the period in which they were out of the country or not lawfully present in the country.

Other provisions of the Act make clear that it does not strip employers of the right to discharge employees during a strike, subject to an order of reinstatement if a violation is proved. For example, specific amendments to the Act were made by Congress in 1947 to give the courts authority to preserve the status quo, pending "adjudication" of an unfair labor practice. Thus, injunctive relief can be sought by the Board, and granted by the District Court, to preserve an employee's status, or for other reasons, pending Board "adjudication". *See, e.g.*, 2 *Developing Labor Law, supra*, at 1638-41. Where the controversy is arbitrable, the Courts will also issue injuctions against a strike, and preserve the status quo pending arbitration. *Boy's Market, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

To hold that Hildabridle remained an employee after his discharge is the equivalent of the Board seeking and

obtaining an injunction against Fina, prohibiting his termination until an unfair labor practice charge is "adjudicated." This is ridiculous in any situation but particularly here, where the Board's Regional Director refused to process the unfair labor practice charge filed by the Union in protest of Hildabridle's discharge.[2]

Additionally, before the Board can order reinstatement, there must be a finding that the company violated the Act. The burden of proof at such a hearing is on the General Counsel to establish a violation of the law by a preponderance of the evidence. *North Cambria Fuel Company v. NLRB*, 645 F.2d 177 (3d Cir. 1981); *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). In an injunction proceeding, the Court must find that there is cause to believe that the Board will prevail in the unfair labor practice case. The Fifth Circuit's conclusion, that the employee retains his status because engaged in an economic strike, effectively eliminates this burden of proof, by simply giving him employment status pending "adjudication" that the employer did not violate the Act. He is an employee until his status is taken away by "adjudication." It, in fact, presumes a violation, merely from the fact that the employee was engaged in an economic strike at the time of his discharge. As noted by the *Fansteel* Court, an employee's protection from discharge under the Act does

[2] Fina felt that it had achieved a significant "victory" when the Board refused to prosecute it for Hildabridle's discharge. Under the Fifth Circuit's "adjudication" test the Company should have encouraged the Board to proceed and try the case, in order that the Company could achieve an "adjudication" that Hildabridle was lawfully discharged. The Fifth Circuit held that this dismissal by the Board was not an "adjudication," but never explained how an "adjudication" ever occurs, when the Board refuses to prosecute an unfair labor practice charge. *Oil Chemical & Atomic Workers*, 759 F.2d at 514-16.

not increase during the time that he is engaged in a strike.

The Fifth Circuit's error in the present case occurred as a result of confusing an economic striker's right not to be discharged for striking, with a discharge for "cause" during the strike. The Fifth Circuit cited *NLRB v. International Van Lines*, 409 U.S. 48 (1972), for the proposition that "an employer may not discharge an economic striker." Fina has no quarrel with this general proposition but it declines to address the issue here. Hildabridle was not discharged for "striking" but for an act of violence, i.e., "cause." Had he conducted himself properly (like the other strikers), the discharge would not have occurred. In *Acrylic Optics Corp.*, 222 N.L.R.B. 1105 (1976), the Board clearly outlined the differences in the two situations:

> Having found that Respondent did not violate Section 8(a)(3) and (1) of the Act when it discharged Green in the course of an economic strike, it follows, and we find, that Respondent also did not violate that section of the Act by its refusal to reinstate Green at the conclusion of the strike. The principles governing the reinstatement rights of economic strikers, . . . are not applicable where, as here, the striker was discharged for cause before the strike ended. Following Respondent's lawful nondiscriminatory discharge, Green lost her status as an "employee" of the Respondent. The fact that she thereafter continued to participate in the strike could not, and did not, serve to restore her "employee" status for purposes of asserting the right, as a striker, to reinstatement.

Id. (citation omitted).

There can be no question but that the company did discharge Hildabridle in May 1982, as found by the Trial Court. The Seventh Circuit set forth the standard for

determining whether a discharge occurred, in *Woodlawn Hospital v. NLRB*, 596 F.2d 1330, 1338 (7th Cir. 1979). In *Woodlawn*, the Court also commented on the Supreme Court's decision in *Fansteel*—which case had also originated in the Seventh Circuit. It said: "In *Fansteel* for example, the Supreme Court held that announcing 'in loud tones' to the sit-down strikers that they were all fired was an effective discharge." *Id.* at 1339. The company's letter of May 1982 met this test. The Back to Work Agreement also refers to "disciplinary action *previously taken* during the strike" (emphasis added). Thus, the Union acknowledged that discipline had occurred.

III. Prompt Correction Of The Fundamental Legal Error Committed By The Fifth Circuit Is Of National Importance.

It is not unusual for violence to erupt during the course of a strike, because the emotions of employees are at fever pitch. Violence may be directed at supervisors, company property, company customers, suppliers, or against non-striking employees. A company's ability to deal with striking employees who engage in such behavior is critical to the company's ability to continue to operate, and is vital to the safety of customers, suppliers, and other employees, who choose to work during the strike. If striking employees believe that they are immune from disciplinary action and the possible loss of seniority, pension benefit accrual, vacation accrual, and the other benefits of employee status, then more violence and disorder will inevitably occur. This potential loss of employment status, along with state prosecution and state court injunctions,

form the nation's primary defenses against lawlessness in strike situations.[3]

The Fifth Circuit's decision injects uncertainty and confusion into an area where clarity and certainty are needed, in order to permit decisive action, as noted by all decisions of this Court since the passage of the Act. The Fifth Circuit freezes the status of striking employees discharged for "cause" until an "adjudication" occurs. This will undercut an important part of the nation's labor law, as developed by this Court and the Board during the last forty-five years. The *Fansteel* Doctrine is so important to the labor field that this Court should restate it as a valid and sustaining principle, upon which the nation's workers and employers can rely.

IV. The Trial Court Properly Held That A Collective Bargaining Agreement Did Not Apply To An Employee Discharged After The Agreement Expired.

The Fifth Circuit did not reach the issue of whether the expired collective bargaining agreement covered Hildabridle's discharge. The Court held instead that the arbitration clause of the newly executed agreement applied to him. However, the Trial Court properly ruled the expired agreement inapplicable to Hildabridle's discharge, because all events leading up to the discharge, and the discharge itself, took place after the termination of the agreement by the Union. The Trial Court correctly distinguished *Nolde Brothers* and subsequent cases, since such cases involved employee benefits accruing during the life of the collective bargaining agreement. The Court distin-

[3] Maintenance of law and order is of such great concern that the Court has permitted an exception to the Federal Pre-emption Doctrine, and allowed state courts to issue injunctions to quell violence. *United Automobile, Aircraft & Agricultural Workers v. Wisconsin Employee Relations Board*, 351 U.S. 266 (1956).

guished other cases, where some events leading to a discharge occurred prior to the termination of the collective bargaining agreement. The Trial Court further pointed out that the Union itself regarded the arbitration and grievance procedures to have terminated at the time the collective bargaining agreement terminated, as set forth in a letter written by the Union's attorneys.

The present case presents this Court with a unique opportunity to clarify two important areas of labor law. The Court should reiterate the *Fansteel* Doctrine, and then clarify the application of its *Nolde Brothers* decision to discipline and non-benefit cases. It can thus advise companies and unions as to the effect of an arbitration clause in an expired agreement on subsequent events. Lower courts and labor practitioners alike have struggled in attempting to apply *Nolde Brothers* to a wide variety of fact situations, as demonstrated in the Trial Court's Opinion. The outer limits of *Nolde Brothers* have proven troublesome. Its proper application is vital to all companies and all employees who are covered by collective bargaining agreements across the nation.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant the Petition for Certiorari and reinstate the Trial Court's decision.

Respectfully submitted,

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By: .....

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....., 1985

**Counsel of Record*

APPENDIX

OIL C. & ATOMIC W. ETC.
v.
AM. PETROFINA C. OF TEX.

OIL CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION LOCAL NO. 4-23, et al., Plaintiffs-Appellants,
v.
AMERICAN PETROFINA COMPANY OF TEXAS, Defendant-Appellee.

No. 84-2322.

United States Court of Appeals, Fifth Circuit.

May 6, 1985.

[759 F.2d 512]

Appeal from the United States District Court for the Eastern District of Texas.

Before WISDOM, WILLIAMS and HILL, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Appellants Oil, Chemical and Atomic Workers International Union Local No. 4-23, and Leo Max Hildabridle, Jr. contend that appellee American Petrofina Company of Texas must submit to arbitration their dispute over the propriety of Petrofina's discharging an economic striker because of alleged improper conduct on the picket line. Petrofina counters that it has no obligation to undertake arbitration because its collective bargaining agreement with the Union expired before it fired the worker and because the new agreement does not apply retroactively. After a bench trial, the district court rendered judgment for Petrofina, 586 F.Supp. 643. Because we conclude that the new agreement requires arbitration of the discharge grievance, we reserve and remand the case with directions

to order arbitration.

I.

The Union's collective bargaining agreement with Petrofina expired on January 8, 1982, and the Union promptly initiated an economic strike at the company's Port Arthur, Texas, refinery. Union members manned picket lines at the gates. Workers refused to cross the picket lines, but Petrofina management continued to work at the plant. Rancor flared up occasionally. Petrofina posted security guards.

The incident that generated the dispute at issue in this case occurred on February 20, 1982, along one of the picket lines. Union member Hildabridle allegedly brandished a knife at security guards, who soon summoned local police. Hildabridle allegedly repeated the assault after the police departed. Local authorities later charged him with a misdemeanor, but a jury found him not guilty. No other tribunal, including the National Labor Relations Board, has adjudicated the lawfulness of Hildabridle's conduct on the picket line or the justification of the company in discharging him.

Petrofina informed Hildabridle of his termination by letter of May 27, 1982. The Union demanded arbitration of the discharge pursuant to the expired collective bargaining agreement, which prohibited firings "without just cause" and mandated arbitration of disputes over discharges, but Petrofina refused.

The strike lasted some eleven months, ending on December 20, 1982, when workers returned to their jobs. On that date, the Union and Petrofina signed a back-to-work agreement and tentatively approved a new collective bargaining contract. The latter document contained grievance and arbitration provisions identical to those in the expired agreement, and it, too, barred discharges without just cause. It said nothing of the Hildabridle dispute. The

back-to-work agreement, however, recorded the disagreement over the arbitrability of Hildabridle's termination: "The Union's position is that such action is subject to the grievance and arbitration provisions and the Company's position is that it is not." The Union again filed a grievance ending in a demand for arbitration, this time pursuant to the new contract. The company again refused, and this suit resulted. The Union alleged that Petrofina's discharge of Hildabridle without just cause and its refusal to submit the grievance to arbitration violated the new collective bargaining agreement and thus constituted a violation of section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185 (1982), which authorizes suits to redress such contractual breaches.

The district court held a bench trial. Observing that any obligation to arbitrate a dispute must arise from a contractual undertaking,[1] the court held that the arbitration clauses in both the old and the new collective bargaining agreements did not apply to the controversy over Hildabridle's discharge. The former contract had ended, and the new one had not taken effect when Hildabridle lost his job. The court accordingly refused to order arbitration and dismissed the Union's claim. The Union appeals.

II.

[1, 2] Established principles make resolution of this case straightforward. As a general rule, "an employer may not discharge an economic striker." *International Union of Electrical, Radio and Machine Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 890 95th Cir. 1983) (citing *NLRB v. International Van Lines*, 409 U.S. 48, 52, 93 S.Ct. 74, 77, 34 L.Ed.2d 201 (1972), *cert. denied*, — U.S. —, 104 S.Ct. 1711, 80 L.Ed.2d 184 (1984). To the extent that federal labor law protects his employment, therefore, the striker remains an "employee" until the strike ends. *See NLRB v.*

[1] *See, e.g., United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960).

Fansteel Metallurgical Corp., 306 U.S. 240, 256, 59 S.Ct. 490, 496, 83 L.Ed. 627 (1939) (citing 29 U.S.C. § 152(3)).[2] It follows that until there is an adjudication of a company's right to fire an economic striker he remains an employee. Thus, Hildabridle was legally still in the status of employee when the strike ended and the new contract went into effect. The failure of the company to treat him as an employee under the new contract raised the issue of the propriety of his discharge under that agreement.

[3] What is critical to the resolution of the appeal in this case is the firm recognition by the courts that they lack authority to decide at this stage of a controversy such as this whether the grievance procedure and arbitration process provided for in the new contract is applicable to Hildabridle's discharge. All the Union needs to show to remove from the courts the power to decide whether this grievance is arbitrable under the new contract is that there is at least some possibility that it is. Whether this dispute is arbitrable under the new contract is an issue that the parties must submit in the first instance to the arbitrator. In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), the Supreme Court spoke with clarity and firmness concerning the obligation of the parties to submit to the arbitrator the issue of arbitrability in a case such as this. The Court said:

> [T]he judicial inquiry under § 301 [of the LMRA] must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not

[2] Section 2(3) of the National Labor Relations Act provides, in relevant part: "The term 'employee' shall include any employee . . ., unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . ." 29 U.S.C. § 152(3) (1982).

> susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Id. at 83, 80 S.Ct. at 1353.

It cannot be said with "positive assurance" that the arbitration clause in the new contract cannot be applicable to this dispute. All that needs to be shown, and it was clearly shown in this case, is that because Hildabridle was an economic striker, and there had been no adjudication of a right to discharge him during the strike, he remained an employee. He was not effectively discharged until the company refused to reinstate him when the new contract went into effect. It is up to the arbitrator, therefore, to decide in the first instance whether the grievance procedure and arbitration promise in the new contract are applicable to Hildabridle's discharge. If he decides that they are, he then can go on to decide on the merits the issue of the justification for the discharge.

[4-6] The National Labor Relations Board also has the authority to decide whether there was justification for firing a striker during an economic strike. Board jurisdiction, however, does not bar an obligation to arbitrate the same dispute. The "congressional policy [is] in favor of settlement of disputes by the parties through the machinery of arbitration . . ." *Warrior & Gulf*, 363 U.S. at 582, 80 S.Ct. at 1353. The Board has a specific policy of deferring to arbitration of disputes where it also has jurisdiction. *Carey v. Westinghouse Electric Corp.*, 375 U. S. 261, 270, 84 S.Ct. 401, 408, 11 L.Ed.2d 320 (1964); *Smith v. Evening News Ass'n*, 371 U.S. 195, 198 n. 6, 83 S.Ct. 267, 269 n. 6, 9 L.Ed.2d 246 (1962). Further, the fact that the board refused to issue a formal complaint on behalf of the Union against the company for discharging Hildabridle is not controlling. *Luckenbach Overseas Corp. v. Curran*, 398 F.2d 403, 406 (2d Cir. 1968). *See* R. Gorman, *Labor Law*, ch. 23, § 12, at 568-73 (1976).

[7] Finally, there is an additional significant consideration establishing that the issue of the arbitrability of this dispute is for the arbitrator in the first instance. The fact is that the parties themselves agreed to disagree about whether the dispute was arbitrable. This alone under *Warrior & Gulf* is enough to require submission of the issue of arbitrability to the arbitrator.

[8] Our jurisdiction to interfere with contract arbitrations set up in collective bargaining agreements is highly restricted. *International Union v. E-Systems, Inc.*, 632 F.2d 487, 489 (5th Cir. 1980), *cert. denied*, 451 U.S. 910, 101 S.Ct. 1979, 68 L.Ed.2d 298 (1981); *Boise Cascade Corp. v. United Steelworkers of America, Local 7001*, 588 F.2d 127, 128 (5th Cir.), *cert. denied*, 444 U.S. 830, 100 S.Ct. 57, 62 L.Ed.2d 38 (1979). We conclude that the district court was in error in refusing to order arbitration of the Union's grievance involving the asserted discharge of Hildabridle for alleged picket line misconduct during an economic strike while there was no contract in effect. Under well-established legal authority, the issue of whether this dispute falls under the arbitration clause of the newly-instituted collective bargaining agreement between the parties must be submitted to an arbitrator pursuant to that agreement since we cannot say with positive assurance that the arbitration clause of that agreement is not susceptible to an interpretation that covers this dispute. The case will be remanded to the district court for the issuance of an order directing the parties to proceed to arbitration under the terms of the December 1982 collective bargaining agreement.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

OIL, CHEMICAL AND ATOMIC
WORKER'S INTERNATIONAL
UNION LOCAL No. 4-23 AND
LEO MAX HILDABRIDLE, JR.

vs.

AMERICAN PETROFINA COMPANY
OF TEXAS

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MEMORANDUM OPINION

This labor dispute arises from an event which occurred during the eleven-month long Oil, Chemical and Atomic Worker's Union strike of the Port Arthur American Petrofina Company Plant in 1982. During that strike, Max Hildabridle, an O.C.A.W. member, was involved in some picket-line violence which resulted in his being terminated by the Fina Company. This termination occurred when no union contract was in effect and no arbitration procedures were in place. The Union seeks an Order from the Court

directing Fina to arbitrate the issue of Leo Hildabridle's discharge; and defendant Fina has responded that since the strike occurred after a contract had expired, Hildabridle was not protected by the contract, and the company was free to deal with Hildabridle without arbitration.

This Court has jurisdiction of this case under Sec. 301(a) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 185 (1978). This case was tried to the Court on March 9, 1984, and post-trial briefs were submitted by both parties. After a careful review of the evidence and the briefs in what appears to be a case of first impression in this Circuit, this Court finds that in this context, Hildabridle was unprotected by any continuing or retroactive contract rights. Therefore, no order to arbitrate will issue and judgment will be entered for defendant.

I. THE BACKGROUND

The facts in this case are undisputed. In late 1981, the war clouds were gathering at the Fina Refinery in Port Arthur, Texas. A collective bargaining agreement between the Company and Local 4-23 of the O.C.A.W. provided that the agreement would stay in effect through midnight January 7, 1982 unless either party served notice to the other "not less than sixty days prior to the desired termination date." On November 1, 1981, the Union served the required notice on Fina that it would terminate the said agreement at 12:01 a.m. on January 8, 1982. Negotiation occurred in an attempt to avert the walkout, but to no avail. On January 8, 1982, the Union struck Fina.

Picket lines were set up, which Union employees refused to cross. The Plant, however, continued to operate with its management personnel. The situation was undeniably tense and ugly. On February 20, 1982, an incident occurred on the picket line involving Hildabridle and several company guards. The guards alleged that in the middle of an argument Hildabridle had pulled a knife and threatened

them. The police were called and the matter was investigated. Charges were filed against Hildabridle, though no conviction resulted.[1]

The company investigated the incident and concluded that it was serious enough to warrant disciplinary action against Hildabridle. The company wrote O.C.A.W. officials and Hildabridle to inform them of the investigation and attempted to schedule an informal hearing with Hildabridle to hear his side of the events. The only answer the company received was a letter from Hildabridle's attorneys protesting the investigation and complaining that Hildabridle would not attend any hearing unless his attorneys could be present. The attorneys also made a statement in their letter that has returned to haunt them. Referring to the company's proposal for a hearing, the attorneys stated "as we all are aware, the labor contract expired at 12:01 a.m. on January 8, 1982. *Upon its expiration, the grievance and arbitration procedure also expired* (emphasis added).[2]

After some further futile correspondence between the parties, the Company acted on its own. After reviewing the evidence, the Company concluded that Hildabridle should be discharged. This decision was made after a meeting of Company officials and was basically the decision of the Company's Vice-President of Employee Relations. Thereafter, by a May 27, 1982 letter, the Company informed Hildabridle that he was terminated as of that date.

The Union then took steps to reinstate Hildabridle. Unfair Labor Practice charges were filed against the Company with the National Labor Relations Board, contending that Hildabridle's discharge was the result of his union activity. The N.L.R.B. refused to act on this charge at both the regional and national level, and eventually the charge was dismissed.

Meanwhile, negotiations to end the strike began. In the final discussions that accompanied the strike's settlement, the Company and the Union discussed Hildabridle's discharge. The Union wanted the plaintiff reinstated; or, if the Company would not agree to this, to have the matter arbitrated. The Company refused both requests. Instead, the Company and the Union agreed to disagree. Within the "Return to work understanding" executed by the O.C.A.W. and Fina in settlement of the strike, a specific clause outlined the parties' conflicting positions on the Hildabridle discharge, leaving the matter to future resolution.[3]

On December 20, 1982, the Union went back to work. That same day, the Union filed a grievance under the *new* contract claiming Hildabridle had been terminated without just cause. Once again, the Company refused to arbitrate the matter. Thus, the Union and Hildabridle brought suit in this Court.

II. THE LAW

It is well-settled that Federal labor policy favors the settling of labor disputes by arbitration. *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (The Steelworker's Trilogy). Yet, it is also well-settled that the obligation to arbitrate a dispute is totally a creature of contract between the parties. No one can be forced to arbitrate a dispute without his express agreement to do so. *Gateway Coal Co. v. United Mine Workers of America, Et Al.*, 414 U.S. 368 (1974). Since there was no contract in effect between the O.C.A.W. and Fina at the time of the May 27 letter terminating Hildabridle, the plaintiff can compel arbitration in this case only by arguing that the discharge was covered by the residual effects of the old contract or by the retroactive effects of the new

contract.

This is, in effect, what the plaintiffs have attempted to do here. Their claim is based on two arguments. First, they claim that the language of the expired contract mandated that its provisions carry over into a situation presented by the instant case, thus compelling arbitration. Second, and alternatively, the plaintiffs argue that Hildabridle's termination could not have occurred on May 27, 1982 as a matter of law, and thus, his termination could only have occurred when the new contract took effect. This being so, the new contract directed that a grievance be filed, and that the matter go into arbitration. For the reasons outlined below, this Court finds neither argument persuasive.

A. The Issue of Post-Contract Arbitrability: Nolde and Its Progeny.

At first blush, it would seem that no clause or requirement of a contract could survive the expiration of a contract. Yet, the plaintiffs' argument in this case, though not applicable in these circumstances, is based on good authority. In *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO,* 430 U.S. 243 (1977), the Supreme Court addressed the general issue. A contract had terminated, and a company has closed a plant. A dispute arose over whether severance pay would be paid as a fringe benefit in the circumstances. The court held the dispute was arbitrable. The court indicated as a ground for its decision that there were strong reasons to believe that the parties did not intend their arbitration duties to terminate automatically with the contract. Otherwise, the employer would be allowed to cut off all arbitration of severance pay claims by simply terminating the contract and then closing the plant — an illogical and unjust result. *See Nolde,* 430 U.S. at 253. It is important to note that in *Nolde,* the severance pay was a benefit that was in place prior to the contract's termination.

Since *Nolde*, several cases have addressed the issue of post-contract arbitrability. From these cases, an important pattern has emerged. It appears that courts will compel arbitration after a contract has expired in two circumstances. When a case involves the accrued rights of employees, such as pension benefits or disability payments, courts will not allow contract termination to extinguish those rights without arbitration of the issue. *See e.g. United Steelworkers of America v. Fort Pitt Steel Casting Division Conval-Penn, Inc.*, 635 F.2d 1071 (3rd Cir. 1980); *Federated Metals Corporation v. United Steelworkers of America, Et Al.*, 648 F.2d 856 (3rd Cir. 1981). Furthermore, arbitration will be ordered in situations where the dispute centers around an event that took place either totally or in part during the term of the contract. *See e.g. Diamond Glass Corp. v. Glass Warehouse Workers & Paint Handlers Local Union 206*, 682 F.2d 301 (2d Cir. 1982). An event can be construed as occurring within a contract when the contract terms are deemed to continue past the contract's formal expiration date.

Several cases have dealt with the issue of a discharged employee. Some of these cases have required arbitration of a discharge even after a contract has terminated. *Each* of these cases fits into one of the above two exceptions. Arbitration was ordered in *Glover Bottled Gas Corp. v. Local Union No. 282*, 711 F.2d 479 (2nd Cir. 1983), even though a contract had expired. In that case, however, employees had been fired because they refused to take a polygraph test concerning a recent theft. The termination occurred after the contract's expiration, but all other significant events — the theft and the refusal to take the test — occurred *during* the contract term. In *Ottley v. Sheepshead Nursing Home*, 688 F.2d 883 (2nd Cir. 1983), a company had signed a contract while a member of an employer's association. The company later withdrew its membership from the association, and a short time thereafter dis-

charged an employee. When the employee sought arbitration, a district court ordered it, but also ordered that the issue of withdrawal from the association be arbitrated first. Thus, the real issue was whether the contract was still in effect. The circuit court affirmed. Other cases ordering arbitration of a discharge in this context seemed to be based on a finding that the contract *itself* had continued, and thus, the arbitrable event occurred under its terms.

The plaintiffs claim that Hildabridle can fit within one of the exceptions. With regard to the line of cases that accept an accrued right as a reason to compel arbitration, Hildabridle alleges that he had a right to job security and a right not to be discharged except for just cause. The Court agrees that these rights are important. Yet, these rights are of a much broader nature than those accrued rights recognized by *Nolde* and subsequent cases. Being of a broader and much different nature, these rights are protected by different means — such as the right to collectively bargain, the right to belong to a union, and so on. It is not something protected by compelling arbitration in this context, and the plaintiff has not cited a case that would so hold.

Likewise, the plaintiffs try to fit itself within the second "continuing contract" exception. His argument fails here, as well. The plaintiff notes that the Company and Union had agreed to arbitration in another matter, though the arbitration was scheduled long after the contract had expired. Yet, the grievance giving rise to this arbitration clearly arose during the regular contract term. Also introduced into evidence was a list of pre-existing disputes carried over for arbitration under the new contract. Once again, every grievance on the list was filed before the expiration of the contract. The conduct of the parties in this matter does not indicate a continuing intent to arbitrate events which occurred while no contract was in force; instead, it reflects a willingness of the Company to take

care of grievances arising under the earlier contract. These grievances would fit in neatly with the exceptions outlined above. The grievance in the instant case does not. The fact that they can be so easily distinguished points up the fallacy of the plaintiff's argument.

By the above arguments, Hildabridle asks this Court to adopt new facts as fitting within the *Nolde* exceptions. Alternatively, the plaintiff asks the Court to accept a new rule of law: That the "duty to arbitrate survives independent of contract expiration unless (1) there is language clearly to the contrary in the collective bargaining agreement; or, (2) there is conduct of the parties that is so clear that a contrary intent is established." *Plaintiff's Brief at 10.* This rule would be founded neither on sound law nor good policy. Plaintiff's authority for his rule comes from a standard laid out in *Fort Pitt, supra*, 635 F.2d at 1075. Yet, *Fort Pitt,* in turn relied on *Nolde*; and it is apparent that its standard is simply an overbroad misinterpretation. Other decisions have limited *Nolde* to apply only to accrued rights and benefits; and this Court believes this is the proper view. Otherwise, almost every clause and term of a collective bargaining agreement would stay in effect after the agreement was terminated. This certainly would not reflect the intention of the parties; but it would certainly lead to a raft of litigation.

B. The Retroactive Effect of The 1982 Contract.

Hildabridle has yet another argument, unrelated to the continuing duty to arbitrate claim. This argument places Hildabridle in the position of an economic striker, who, according to accepted Federal labor policy [*See N.L.R.B. v. International Van Lines,* 409 U.S. 48 (1972)], cannot be terminated without being permanently replaced. Since, the plaintiffs argue, Hildabridle was never permanently replaced, he could not have been terminated during the strike period; instead, Hildabridle's termination only

became effective on December 20, 1982, the date of the new contract. As such, plaintiff contends, Hildabridle's termination was arbitrable under the *new* contract.

This argument must also fail. It is well-settled in this Circuit that a dispute over events that occurred prior to the execution of a collective bargaining agreement is not arbitrable where it is clear the parties did not agree to arbitrate it. *Local 787 IUE v. Collins Radio Co.*, 317 F.2d 214 (5th Cir. 1963). Contrary to plaintiff's argument, there is nothing in the record to indicate that the company ever intended to arbitrate Hildabridle's discharge. In the "Return to Work Understanding" that presaged the end of the strike, it was specifically stated "As to disciplinary action previously taken during the strike both the company and union preserve their positions as to the application of the grievance procedure." From the evidence presented, it is apparent that disciplinary action had been taken during the strike regarding only one employee: Hildabridle. Thus, this clause in the "Return to Work Understanding" has to refer to him. Thus, the "Understanding" specifically preserved the company's position concerning Hildabridle. Plaintiff has not buttressed his argument concerning the applicability of the new contract with either good facts or case law; and therefore, there is nothing to dissuade the Court from saying the rule of *Collins Radio* should apply. Clearly, the Company never intended to arbitrate Hildabridle's dismissal, which occurred on the earlier date.

III. CONCLUSION

In sum, there is nothing in the present action that would cause the Court to compel arbitration. There was no contract in effect providing for arbitration. No reason has been shown for ruling that the contract's arbitration clause survived the contract's expiration. Finally, no intent to arbitrate has been proven. It is therefore,

ORDERED, ADJUDGED and DECREED that Judgment be entered for Defendant American Petrofina Company and against Plaintiffs Oil, Chemical, and Atomic Worker's International Union Local No. 4-23 and Leo Max Hildabridle, Jr., in that no order compelling arbitration will issue.

SIGNED this 5th day of May, 1984.

Joe J. Fisher

Joe J. Fisher
United States District Judge

FOOTNOTES

[1] This Court does not reach the merits of Hildabridle's case. In fairness, however, the Court will note that a state court jury acquitted Hildabridle of a misdemeanor charge of a terroristic threat on November 8, 1983. All other charges were later dismissed.

[2] The plaintiffs have strenuously objected to the admission of this letter into evidence. They claim the letter is unfairly prejudicial and has been improperly characterized as an admission against interest. The Court is convinced, however, that the letter is not unfairly prejudicial, and that it is admissible under Fed. Rule Evid. 803(24), the residual exception to the hearsay rule, in that the letter had circumstantial guarantees of trustworthiness. It is used to illustrate the negotiations that occurred during the strike period.

[3] The plaintiffs have cited two decisions at the District Court level ordering arbitration of a discharge. Neither are applicable, nor persuasive. In *Newspaper Guild v. Central States Publishing Co.*, 451 F.Supp. 1112 (D.C. Pa. 1978), the court found that at the expiration of a labor contract, the company and the union had agreed to negotiate, and had further agreed to abide by the terms of the old agreement while negotiations continued. *Id.* at 1115. Furthermore, when a new contract was signed, the parties expressly agreed that its terms would apply retroactively to the expiration date of the old agreement. *Id.* The event causing the discharge can be viewed as occurring while contract terms were in effect. Arbitration was also ordered in *Washington-Baltimore Newspaper Guild v. The Washington Post Co.*, 442 F.Supp. 1060 (D. D.C. 1977). There, however, an agreement between the company and a union provided that the terms of the old agreement would govern while negotiations continued. Negotiations ended when a rivalry developed between two unions over which was the proper NLRB representative. The court would not allow the company to escape arbitration in these circumstances. But it was a unique circumstance; and the court specifically stated that it was "not necessary to confront the question of the propriety of directing arbitration after the termination of a collective bargaining agreement" *Id.* at 1063. Clearly, neither case fits the instant cause.

In the United States Court of Appeals
For the Fifth Circuit

No. 84-2322

OIl Chemical & Atomic Workers
International Union Local No. 4-23, Et Al.,
Plaintiffs-Appellants,

versus

American Petrofina Company of Texas,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 5/06/85), 5 Cir., 198__, _____ F.2d ____)
(June 4, 1985)

Before Wisdom, Williams and Hill, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en

banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

J. S. WILLIAMS
United States Circuit Judge

Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-279

In The
Supreme Court of the United States
October Term, 1985

AMERICAN PETROFINA COMPANY OF TEXAS,
Petitioner,

v.

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION LOCAL NO. 4-23, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION LOCAL NO. 4-23 and LEO MAX HILDABRIDLE IN OPPOSITION

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QUESTIONS PRESENTED

I. Under the Collective Bargaining Agreement signed and effective 12/20/82, was the discharge of Leo Max Hildabridle arbitrable?

II. Under the expired Agreement and pursuant to *Nolde Brothers Incorporated vs. Local 358, Bakery and Confectionary Workers,* 430 U.S. 243 (1977), was the discharge of Leo Max Hildabridle arbitrable under the Agreement which expired 1/08/82?

STATEMENT OF INTERESTED PERSONS

The Respondent, Local 4-23, of the Oil, Chemical & Atomic Workers International Union, is the certified bargaining agent for employees at the American Petrofina Refinery located in Port Arthur, Texas. Leo Max Hildabridle, Jr., had been an employee of that facility and a member of that Labor Organization prior to his discharge. Mr. Hildabridle, the Local Union, and the American Petrofina Company of Texas, together with its parent company, American Petrofina, Incorporated, are the only parties who are known to have an interest in the outcome of this case, aside from their attorneys of record.

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BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Following contract expiration on January 8, 1982, the Oil, Chemical & Atomic Workers International Union, Local 4-23 ("O.C.A.W." or "Union"), struck the American Petrofina Company of Texas ("the Company"), Port Arthur plant. Picket activity was immediately instituted at the gates of the plant. Respondent Hildabridle honored the picket line and did not report for work on January 8, 1982, nor at any time until the strike concluded. On December 20, 1982, five (5) days following the reaching of a tentative agreement, and on the date that a new contract was signed, the other employees represented by the O.C.A.W., returned to work at the Port Arthur plant. Mr. Hildabridle was not permitted to return to work due to the Company's assertion that he had committed picket-line misconduct on February 20, 1982.

The Company, acting through one of its employees, had instituted criminal charges in Jefferson County, Texas, based on the accusations of picket-line misconduct. (Plaintiff's Exhibits 1, 2 and 3, and testimony of William Crabtree, Trial Record, page 38). Respondent Hildabridle was acquitted of the charges relating to the picket-line activity, by a jury of his peers. (Plaintiff's Exhibit 2). Following the acquittal, all other criminal charges against Mr. Hildabridle relating to any of his strike conduct, were dismissed by the Jefferson County District Attorney's Office. (Plaintiff's Exhibits 1, 2 and 3). Prior to his acquittal, the Com-

pany departed from its custom and practice and sought to discipline Mr. Hildabridle during the term of the economic strike. (Record, pages 12-15). In the past, prior allegations related to strike violence had been dealt with in the back-to-work agreement and had never resulted in employee discipline. (Trial Record, 13-15, and Plaintiff's Exhibit 12). In view of this, the Union sought to negotiate the reinstatement of Max Hildabridle when the tentative agreement was reached on December 15, 1982. (Trial Record 15-17). During the five (5) days that passed between the reaching of the tentative agreement and the signing of the Collective Bargaining Agreement on December 20, 1982, the parties discussed and negotiated the reinstatement of Leo Max Hildabridle and/or the arbitration of his discipline. (Trial Record, 16-19, Exhibit 8-9(d)). The early drafts of the Company's back-to-work agreement would have foreclosed any cause of action in federal court compelling arbitration, as well as waived Mr. Hildabridle's right to arbitrate his discharge or the Company's failure to reinstate him. The final back-to-work agreement, as it was signed, preserved both the Union's right to maintain that either his discharge was arbitrable, or his reinstatement was arbitrable.

When the other economic strikers returned to work on December 20, 1982, the Union filed a grievance concerning the failure to reinstate Mr. Hildabridle. That grievance was accepted by the Company and was processed under an expedited procedure relating to discharge cases. However, following the processing of the grievance, the Company refused to submit the case to arbitration. It was following the Company's refusal to arbitrate the matter of his reinstatement or discharge that the instant ac-

tion was filed in the federal court, seeking an order compelling arbitration under 29 U.S.C. § 185(a).

As was adequately presented by the Petitioner, the district court ruled in favor of the Company, holding that there was no agreement to arbitrate and refusing to require arbitration either on the discharge or on the reinstatement. The United States Court of Appeals for the Fifth Circuit reversed and remanded the district court's ruling. The fifth circuit determined that the discharge of Max Hildabridle became effective on the date of the return to work, and required arbitration under the new agreement. The fifth circuit's opinion permitted the arbitrator to consider the question of arbitrability along with the question of good cause for discharge. The Company sought a rehearing or rehearing en banc, which was denied. (See Appendix, pages A-18 through A-19). Following that, in a timely fashion, the Petition was filed in this Honorable Court.

—o—

REASONS FOR DENYING THE WRIT

Contrary to the assertions of the Petitioner, the fifth circuit's opinion supports a fundamental tenet of federal labor law and policy—the preference for settling of labor disputes by arbitration. Additionally, the Company attempts to convince the Court that the fifth circuit decision in some way conflicts with *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). As the following argument will demonstrate, no conflict or erosion of the *Fansteel* doctrine exists. The fifth circuit's decision is supported

by the federal labor policy which favors the settlement of disputes by binding arbitration. Since the industrial sanction of discharge remains in effect until such time as an arbitration decision declares that the discharge action was without "just cause," the Company's arguments that employers possess no deterrent action to violence and irresponsible conduct are incorrect. The only action which the fifth circuit's decision encourages is the reference of employee discipline cases concerning economic strike activity to an arbitrator, even though the subject matter of the discipline might have occurred during a period when no contract was in effect. Because of the strong preference for arbitration as a settlement mechanism for labor disputes, the fifth circuit's decision is in harmony with several prior decisions of the Court.

I. National Labor Policy And Prior Decisional Law Supports The Decision Of The Fifth Circuit.

The *Steelworkers* trilogy enmeshed in the fabric of federal labor law the strong preference for requiring industrial disputes to be resolved by arbitration. *United Steelworkers of America v. American Manufacturing Company,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Company,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car,* 262 U.S. 592 (1960). In *Warrior and Gulf,* federal labor law required lower courts to resolve all doubts in favor of coverage under an arbitration clause. 363 U.S. at 583. Restated, the lower courts were required to issue orders compelling arbitration in most circumstances:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Id., at 582-583. Following the *Steelworkers* Trilogy, the fifth circuit found that the discharge of Max Hildabridle was arbitrable under the new labor agreement and issued an appropriate order. *Oil, Chemical & Atomic Workers International Union Local No. 4-23 v. American Petrofina Company of Texas,* 759 F.2d 512, 517 (5th Cir. 1985). The fifth circuit followed a line of decisions supporting the *Steelworkers* Trilogy: *International Union v. E-Systems, Inc.,* 632 F.2d 487 (5th Cir. 1980), *cert. denied,* 451 U.S. 910 (1981); *Boise Cascade Corporation v. United Steelworkers of America, Local 7001,* 588 F.2d 127 (5th Cir. 1979), *cert. denied,* 444 U.S. 830 (1979). *See also Alabama Power Company v. Local Union 391,* 612 F.3rd 960 (5th Cir. 1980); *International Union of Electrical, Radio and Machine Workers v. Ingram Manufacturing Company,* 715 F.2d 886 (5th Cir. 1983).

As a matter of federal law, the preference for arbitration has formed a decisional basis for requiring successor companies to arbitrate labor disputes. *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964). Relying upon the strong preference for arbitration as a means of settlement of disputes, this Court has previously held that arbitration may survive contract expiration. *Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers Union,* 430 U.S. 243 (1977). Following federal policy first enunciated by the Congress in the passage of Section 301 and relied upon by this Honorable Court in the *Steel-*

workers Trilogy, *John Wiley and Sons* and *Nolde Brothers,* the fifth circuit's holding in this case should not be disturbed. An obligation to arbitrate was entered into by the parties in the contract that expired on January 8, 1982, and identical contract language renewed all arbitration and grievance provisions in the contract entered into on December 20, 1982. The contract itself failed to exclude the matter of Mr. Hildabridle's discharge or reinstatement. As such, following prior decisional law, the decision of the fifth circuit should not be disturbed.*

II. The Fifth Circuit's Decision Does Not Conflict With The Fansteel Doctrine.

The fifth circuit's decision below is a natural extension of the rule enunciated in *NLRB v. Fansteel Metallurgical Corp.,* 306 U.S. 240 (1939). The Company claims that the fifth circuit's decision in some way erodes the doctrine that an employee guilty of strike misconduct may be discharged without regard to whether or not the employer had also committed unfair labor practices. The *Fansteel* doctrine quite simply arose out of the NLRB's contention that the prior illegal conduct of the employer insulated unfair labor strikers who committed unlawful conduct. The Board maintained that based on the prior illegal conduct of the employer, these unfair labor practice strikers should have been reinstated.

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* In reaching the decision in *Nolde Brothers,* the Court specifically relied upon the parties' failure to exclude from arbitrability contract disputes arising after termination of the contract. *Nolde Brothers,* 430 U.S. at 255. Since the contract itself did not exclude the Hildabridle matter, reference to the arbitrator should be upheld.

In *Fansteel,* ninety-five workers occupied two key buildings of a metal working facility. Following the occupation of the buildings, work stopped and the remainder of the metal working plant ceased operations also. 306 U.S. at 248. Following the occupation of the buildings, a state court issued an injunction requiring those workers to vacate the premises. *Id.* at 249. Following their refusal to do so, contempt proceedings were instituted against the occupying workers and fines and jail sentences were meted out. *Id.* at 249. In that case, the question of the illegality of the conduct had been adjudicated three times by the time the Board's resolution of the conduct was reviewed. The state judge, in deciding to issue the injunction, had considered the illegality of the conduct. Additionally, when contempt proceedings were instituted against the workers, they received an opportunity to defend their actions. Finally, in the Board proceedings, which were subject to judicial review, the question of the individual strikers' guilt or innocence was necessarily considered. Therefore, the persons occupying the premises had three determinations of guilt before their discharges were upheld.

In this case, Max Hildabridle has been exonerated of the criminal charges which form the underlying basis for the Company's decision to discharge him. With respect to whether or not those actions constitute just cause for discharge, there has been no such adjudication. It was upon that very tenet that the fifth circuit's decision was based. The only finding on Mr. Hildabridle's alleged misconduct was an adjudication of innocence on the criminal offense. As such, Mr. Hildabridle is entitled to his industrial day in court.

The Company has argued that the fifth circuit decision takes away the industrial sanction of discharge from an employer. This position is patently untrue. Mr. Hildabridle has not worked at the American Petrofina Refinery since the return to work on December 20, 1982. He will soon have been deprived of his job for a period of three (3) years. What is at stake in this controversy is whether or not the parties are required to go to an independent and impartial arbitrator to determine whether or not his discharge was for just cause. Mr. Hildabridle's right to job security has been protected by that type of discharge provision since he became an employee of the Company. The Company seeks to discharge without any consideration of whether or not their action was proper. In light of Mr. Hildabridle's acquittal, substantial doubt exists as to whether or not the Company's action was justified.

In other labor disputes, under the fifth circuit decision, the employer is not deprived of the right to discharge the worker during the hiatus period. Following the conclusion of the strike, assuming that a prior agreement to arbitrate is renewed and no reinstatement to work is negotiated, the employer is required to submit the merits of the discharge to an arbitrator. Discharge has often been considered to be an extreme industrial penalty and likened to economic capital punishment. F. Elkouri and Elkouri, *How Arbitration Works,* p. 661, n. 60 (4th

Ed. 1985). Provided the employee possesses job security rights in terms of arbitration of discharge for just cause, the employer may impose discipline for strike-related misconduct pending an adjudication that such misconduct occurred.

In that regard, the fifth circuit's decision does nothing to erode the *Fansteel* Doctrine. It is interesting to note that in the *Fansteel* dispute, the workers possessed no arbitration rights, since the entire matter grew out of union recognition and prior to the execution of a collective bargaining agreement. The *Fansteel* Doctrine has the same viability following the fifth circuit's decision in the instant case. That is, a worker may lose his protection under the Act if the worker is found to be guilty of strike-related misconduct. However, the employee loses his protection under the Act only when it is determined that misconduct has occurred.

III. Mr. Hildabridle's Discharge Is Arbitrable Under The Collective Bargaining Agreement Effective 12/20/82

The fifth circuit determined that Mr. Hildabridle's discharge was not effective until the date of the return to work. The opinion states:

> He was not effectively discharged until the Company refused to reinstate him when the new Contract went into effect.

American Petrofina, 759 F.2d at 515. At the very time the discharge was held effective, a Contract requiring arbitration of discharge cases was in effect. Following the *Steelworkers* Trilogy, an agreement to arbitrate existed at

the time the discharge was held to be effective and an Order requiring arbitration must follow. *See American Manufacturing Company*; *Warrior and Gulf; and Enterprise Wheel and Car.*

As an economic striker, Max Hildabridle had certain rights to reinstatement at the conclusion of the strike. In the absence of permanent replacements, an economic striker generally has the right to be reinstated. *NLRB v. International Van Lines,* 409 U.S. 48 (1972); *NLRB v. McKay Radio and Telephone Company,* 304 U.S. 333 (1938). No economic strikers at the Company's Port Arthur Plant were permanently replaced. As such, the Fifth Circuit recognized that Mr. Hildabridle's right of reinstatement was viable and that his discharge was not effective until such time as the Company refused to reinstate him.

Many arbitrators have faced questions regarding discipline of employees duing strikes and during a contract hiatus. *Dan's Market, Incorporated,* 72 L.A. 709 (1979); *Dynamic Manufacturing Company,* 36 L.A. 635 (1960); *Tarcon Incorporated,* 64 L.A. 955 (1975). Reinstatement rights arise from the continued right to job security established over many years of predecessor agreements and the renewal of the contractual relationship between the parties. This right to job security may be said to be independent of the NLRB rights. As one arbitrator phrased it:

> To lose one's rights under the Act is one thing, to lose one's rights under the Labor Agreement is another matter.

Dan's Market, Incorporated, at 709. In the *Dan's Market* case, the arbitrator required reinstatement of strikers aft-

er the Board declined to issue complaints concerning their discharges. It is useful to note that the arbitrator considered the following relevant dates: Company's Discharge Notice, 9/20/77; Back-To-Work Agreement and first return to work, 5/15/79. In ruling in favor of the economic strikers, the arbitrator ordered reinstatement. However, in the remedy phase of his decision, back pay was retroactively ordered only from the date of the return to work. Viewing it from the remedial context, neither the strikers in the *Dan's Market* case nor Max Hildabridle actually had any grievable loss until such time as the return to work became effective. As such, he had a right of reinstatement consistent with, but independent of, his NLRB rights. He had not sustained any grievable loss until the return to work agreement was signed because until such time as the picket line activity had ceased, he would not return to work. Therefore, the court's finding that the effective date of the discharge occurred on the date that the arbitration procedure was renewed is both legally and factually correct. As such, the fifth circuit's decision should not be disturbed.

IV. Mr. Hildabridle's Discharge Is Arbitrable Under The Expired Agreement.

The fifth circuit did not reach the question of arbitrability under the expired agreement. Because the court found the discharge effective on the date of the return to work and recognized the right of reinstatement, it was not necessary to reach the question as to whether the discharge was also arbitrable under the expired agreement. Even the Company concedes that the fifth circuit did not reach the question of whether the discharge was arbitrable under

the expired agreement. (*See* Petition for Writ of Certiorari, page 19). Without belaboring the point, this Court has determined that an agreement to arbitrate may survive contract expiration under certain circumstances. *Nolde Brothers.* In reaching the decision that arbitration survives contract termination, this Court placed great reliance on the national policy favoring arbitration as a means of settlement of industrial disputes. If the subject matter of a particular grievance is arbitrable, then *Nolde Brothers* stands for the proposition that the presumption of arbitrability is not defeated simply because the grievance arises after contract expirations.

The rule enunciated in *Nolde Brothers* has spawned its own progeny. *Hotel and Restaurant Employees v. Williams,* 752 F.2d 1476 (9th Cir. 1985); *Nibbs v. Felix,* 726 F.2d 102 (3rd Cir. 1985); *Glover Bottled Gas Corporation v. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 711 F.2d 479 (2nd Cir. 1985); *Ottley v. Sheepheads Nursing Home,* 688 F.2d 883 (2nd Cir. 1982); *Federated Metals Corporation v. United Steelworkers of America,* 648 F.2d 856 (3rd Cir. 1981); *United Steelworkers of America v. Fort Pitt Steel Casting Division-Conval-Penn., Incorporated,* 635 F.2d 1071 (3rd Cir. 1980); *Newspaper Guild of Greater Philadelphia, Local 10 v. Central States Publishing Company,* 451 F.Supp. 1112 (D.C. Pa. 1978); *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Co.,* 442 F.Supp. 1060 (D. D.C. 1977).

Nolde Brothers itself was a benefits case and certain of the decisions cited above also concern employee benefits which the employees argued were due to them after con-

tracts expired. *See, e.g., Fort Pitt and Federated Metals.* A series of contracts in the industrial relations atmosphere gives rise to another form of a continued benefit—the right to job security. It is the pattern of successor contracts that creates and enforces job security among working people who are represented by labor unions. Throughout Mr. Hildabridle's employment, he had a right to be discharged only for just cause, a right which was created in his contract and continued to attach to him whenever he worked, since he never worked without a contract. As such, the Respondents maintain that the benefits cases are entirely analogous to the instant case, since job security is another right created under an expired agreement. In the benefits cases, the employee rights were created under the expired contract, but the incidents which gave rise to the claim for those rights for benefits occurred following the contract expiration. In *Fort Pitt* and *Federated Metals,* no successor agreement was ever reached. In that respect, the continuation of the job security right in this case has even greater force. His right to job security arose under the old contract and was renewed voluntarily by the Company on December 20, 1982.

Four of the cases cited above deal with cases of employee discipline either following expiration of a contract or withdrawal from a multi-employer contract. They are *Glover Bottled Gas*; *Ottley; Washington Post* and *Central States Publishing.* Without exception, each of these cases required arbitration of the out-of-contract discharges. The reasoning relied upon by the various courts differs, but the results are uniform—arbitration is required.

In reviewing the evidence, the contract provisions themselves support continued arbitration. The contract

possesses a broad arbitration provision. (See Plaintiff's Exhibit 4, Article 5). The contract language does not condition the duty to arbitrate upon the life of the contract nor limit the duty to arbitrate upon the expiration of the contract. Additional contractual evidence which supports the determination that arbitration is continuing is the twenty-four month limitation period. In both contracts, the Company and the Union agreed that no issue would be re-arbitrated within a twenty-four month period. Therefore, by implication, the parties intended that the arbitration obligation would continue beyond the life of a particular contract. The no-strike clause is not located in the arbitration article section, so it may be said that the right to strike is not conditioned upon the failure to arbitrate. (See Plaintiff's Exhibits 4 and 7).

Further, the conduct of the parties evidenced an intention to continue to arbitrate. The parties agreed to arbitrate a dispute while no contract was in force. The actual arbitration proceeding was scheduled during the hiatus period. That action though it resulted in settlement rather than arbitration, clearly demonstrates that the parties viewed their arbitration obligations to be continuing. Plaintiff's Exhibit 11 was a list prepared by a Company official of pre-existing disputes that were considered to be arbitrable under the new contract. If the parties did not view their arbitration obligation to be continuing, then either party in the event of a hiatus could claim that pre-existing disputes were no longer arbitrable. Some of the grievances listed in Plaintiff's Exhibit 11 were at least eight (8) years old, dating back to 1978, showing the length of their history as well as the fact of successive carry over. Any conclusion that the conduct of the parties was such

that it defeated the continuing duty to arbitrate would be clearly erroneous.

The contract language, as well as the conduct of the parties themselves, evidenced that the duty to arbitrate was continuing. As such, the matter of Mr. Hildabridle's discharge is also arbitrable under the expired agreement. Such a decision would be entirely consistent with federal labor law and policy as enunciated in *Nolde Brothers.*

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CONCLUSION

The Writ of Certiorari should not be issued in this case. The Petitioner has failed to show any conflict between the decision of the fifth circuit and any decision of this Honorable Court. A closer reading of *Fansteel,* shows that no conflict in fact exists. Furthermore, since the decision of the fifth circuit is supported by numerous prior decisions of this Court, including but not limited to the *Steelworkers* Trilogy; *John Wiley and Sons,* and *Nolde Brothers,* the decision of the Court below should not be disturbed. Alternative grounds exist for the decision rendered by the fifth circuit. Mr. Hildabridle's discharge is in fact arbitrable under the new agreement. Despite the fact that the court did not reach the second issue, it can be concluded that the discharge of Mr. Hildabridle was also arbitrable under the expired agreement. Therefore, no sound reasons exist for the issuance of this Writ of Certiorari.

WHEREFORE, PREMISES CONSIDERED, the Respondents pray that the Court deny the Petition for Certiorari in all things and that the decision of the fifth circuit be permitted to stand, and that this cause proceed to arbitration consistent with the court's Order. Additionally, the Respondents seek whatever further relief, at law or in equity, to which they may show themselves entitled.

Respectfully submitted,

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SUPPLEMENTAL BRIEF OF PETITIONER

Respectfully submitted,

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EDITOR'S NOTE

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SUPPLEMENTAL BRIEF OF PETITIONER

This Supplemental Brief is filed to call the Court's attention to the similiarity of this case and the Court's

recent decision in AT&T Technologies, Inc. v. The Communication Workers of America, 54 L.W. 4339 (April 7, 1986).

In AT&T Technologies the Court reversed the courts below which had ruled that the issue of arbitrability was to be decided by the arbitrator. The Court restated the fundamental principles contained in its earlier decisions that:

1. An agreement to arbitrate a dispute must be created by the contract of the parties;

2. The issue of whether or not the parties intended for their contract to create a duty to arbitrate a particular issue must be decided by the courts - not the arbitrator; and

3. In interpreting the agreement of the parties, courts are to resolve doubts as to the parties' intentions in

favor of the arbitrability of the dispute.

In AT&T Technologies the Court made clear, again, that it would not create an obligation to arbitrate if the parties themselves had not done so, nor would it permit an arbitrator to have "free wheeling" authority to establish his own jurisdiction.

In the present case, Mr. Hildebridle was discharged for strike misconduct. All events leading to the discharge and the Company's act of discharging him occurred several months after a collective bargaining agreement expired. More than 7 months passed before a new agreement was executed and the strike ended. The trial court specifically found, in denying arbitrability of the discharge action, that the parties did not intend to arbitrate the Hildebridle discharge

(A-15). This was based on the fact that the Union sought, unsuccessfully, to obtain the Company's agreement that the discharge would be arbitrated (A-10). A back to work agreement was signed by the parties at the time the strike ended stating, as to any discharge which had previously occurred during the strike, that the parties preserved their position - the Company's being that it was not subject to the expired arbitration clause and the Union's position being that it was. This ruling of the Trial Court complied completely with the standards just restated in AT&T Technologies.

The Fifth Circuit did not review the Trial Court's findings (that Hildebridle had been effectively discharged and that the parties did not intend to arbitrate), based on the "clearly erroneous" standard of review. Rather, it ignored these

findings and created another standard, totally artificial and without precedent that no effective discharge occurred. It said that Hildebridle remained an employee - in spite of the fact that Fina intended to and did discharge him - unless and until the National Labor Relations Board "adjudicated" him otherwise. This conclusion was reached in spite of the fact that the National Labor Relations Board had specifically refused to reach the "adjudication" stage because it refused to issue an Unfair Labor Practice Complaint (A-9). Thus, the Fifth Circuit reasoned that he was automatically covered by the new contract which covered all employees not previously discharged - regardless of the terms of the "back to work" agreement of the parties.

After announcing this standard for determining arbitrability, the Court then turned the question of deciding arbitrability over to the arbitrator. It said:

> "It is up to the arbitrator, therefore, to decide in the first instance whether the grievance procedure and arbitration promise in the new contract are applicable to Hildebridle's discharge. If he decides that they are he can go on to decide on the merits the issue of the justification for the discharge." (Appendix A-5)

What standard is the arbitrator to use in determining arbitrability? The contract of the parties and the intent of the parties - as called for by AT&T Technologies - is ignored by the Fifth Circuit and obviously must be ignored by the arbitrator if he is to follow that Court's instructions. This limits him to be guided only by his own "understanding and conscience", a standard expressly rejected in AT&T Technologies.

In its Petition for Writ of Certiorari, Fina called attention to the fact that the Fifth Circuit's ruling, creating a continuing employment status until "adjudication", could lead to increased strike violence because employees who engaged in such conduct were insulated from effective discharge. The Union's response was that this would not occur because the action of discharge took effect when the employer said it did. It said:

> "Since the industrial sanction of discharge remains in effect until such time as an arbitration decision declares that the discharge action was without 'just cause,' the Company's arguments that employers possess no deterrent action to violence and irresponsible conduct are incorrect." (Respondent's Brief p. 4.)

In other words, the Union itself appears to disagree with the Fifth

Circuit's conclusion that a discharge of an economic striker cannot take effect until it is "adjudicated" to take effect. It sees the discharge action as in effect until it is set aside - if this ever occurs. This is precisely how Fina understands the law and if Hildebridle was effectively discharged when the Company took the action, then Hildebridle was not an employee when the new contract was executed. As explained in Fina's Petition, the Fifth Circuit's rule runs contrary to cases decided by this Court; is a deviation from fundamental principles of labor law; and limits the parties' ability to settle strikes where discipline has occurred.

Conclusion

The opinion of the Fifth Circuit in this case, if allowed to stand, will create confusion in the area of employer

- employee rights when strikers engage in misconduct. This area needs certainty, not uncertainty. It will also create an "exception" to the standards for determining arbitrability and will allow the Arbitrator to make this determination, the same mistake made by the Seventh Circuit, which caused this Court to reverse that Court in AT&T Technologies.

Respectfully submitted,

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No. 85-279

In the Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN PETROFINA COMPANY OF TEXAS,
PETITIONER

v.

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL
UNION LOCAL NO. 4-23 AND LEO MAX HILDABRIDLE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the parties to a labor contract must submit a grievance to an arbitrator whenever there is "some possibility" that the grievance is arbitrable, so that the arbitrator may decide in the first instance whether the grievance is in fact arbitrable under the parties' contract.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 759 F.2d 512. The opinion of the district court (Pet. App. A7-A17) is reported at 586 F. Supp. 643.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1985, and a petition for rehearing was

denied on June 4, 1985 (Pet. App. A18-A19). The petition for a writ of certiorari was filed on August 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Oil, Chemical & Atomic Workers International Union Local 4-23 represented the employees at petitioner's refinery in Port Arthur, Texas, during the time period relevant in this case. The union notified petitioner in November 1981 that it planned to exercise its right to terminate the parties' collective bargaining agreement at 12:01 a.m. on January 8, 1982. Despite the parties' efforts to resolve their differences through negotiation, the agreement expired and the union went on strike. Pet. App. A2, A8.

On February 20, 1982, an incident took place involving employee Leo Hildabridle, one of the striking employees picketing the refinery. Guards employed by petitioner alleged that Hildabridle threatened them with a knife.[1] Petitioner investigated the incident and decided to discharge Hildabridle. Petitioner notified Hildabridle by letter that he was terminated as of May 27, 1982. Pet. App. A8-A9.[2]

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[1] Hildabridle was charged with a misdemeanor, but was found not guilty after a jury trial (Pet. App. A2, A9 & n.1).

[2] During petitioner's investigation of the incident, it contacted union officials in order to schedule an informal hearing at which Hildabridle could present his version of the events of February 20. Hildabridle's attorneys responded that Hildabridle would not attend the hearing unless they could be present. The attorneys further stated that the grievance and arbitration procedure established under the collective bargaining agreement was no longer in effect due to the expiration of that agreement. Pet. App. A9.

The union demanded arbitration of the discharge pursuant to the expired collective bargaining agreement; petitioner refused to submit the dispute to arbitration (Pet. App. A2). The union then filed unfair labor practice charges with the National Labor Relations Board (NLRB) alleging that the discharge was motivated by Hildebridle's union activity. The NLRB regional director refused to issue a complaint, the general counsel upheld that determination, and the charges accordingly were dismissed. *Id.* at A9.

Hildabridle's discharge also became an issue in the contract negotiations. Petitioner rejected the union's demands that Hildabridle be reinstated or, in the alternative, that the matter be submitted to arbitration. On December 20, 1982, petitioner and the union signed a back-to-work agreement and a new collective bargaining agreement. The new collective bargaining agreement contained grievance and arbitration provisions as well as a clause prohibiting discharges without just cause. The back-to-work agreement contained a provision recording the parties' differing views regarding Hildabridle's discharge. The agreement stated that "[t]he Union's position is that such action is subject to the grievance and arbitration provisions and the Company's position is that it is not." Pet. App. A2-A3.

The union subsequently filed a grievance under the new contract alleging that Hildabridle had been discharged without just cause; petitioner refused to submit the grievance to arbitration. The union and Hildabridle then commenced this action in the United States District Court for the Eastern District of Texas under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. They sought an order compelling petitioner to arbitrate the dispute concerning Hildabridle's discharge. Pet. App. A10.

The district court concluded that the dispute was not subject to arbitration and entered judgment for petitioner (Pet. App. A7-A17). The court first rejected respondents' contention that the arbitration clause of the expired contract applied to Hildabridle's discharge. The court observed that in *Nolde Brothers, Inc.* v. *Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977), this Court held that the parties' duty to arbitrate a dispute over severance pay did not lapse upon termination of the collective bargaining agreement. The district court in the present case concluded that arbitration may be compelled under the arbitration provision of an expired contract when the dispute "involves the accrued rights of employees, such as pension benefits or disability payments" or when the dispute "centers around an event that took place either totally or in part during the term of the contract" (Pet. App. A12). The court also noted that "[a]n event can be construed as occurring within a contract when the contract terms are deemed to continue past the contract's formal expiration date" (*ibid.*).

The court found, however, that the contract right asserted by Hildabridle—the right to be discharged only for cause—was not an accrued right analogous to pension benefits or severance pay. The court also determined that the events giving rise to the dispute in this case did not arise during the term of the contract and found no evidence that the parties intended to maintain the contract terms in force after the expiration of the contract. The court therefore concluded that petitioner had no duty under the expired contract to arbitrate the dispute concerning Hildabridle's discharge. Pet. App. A12-A14.

The court also rejected respondents' claim that Hildabridle's discharge did not become effective until December 20, 1982, the date of the new contract, and that the discharge therefore was arbitrable under the new contract. It stated that "a dispute over events that occurred prior to the execution of a collective bargaining agreement is not arbitrable where it is clear [that] the parties did not agree to arbitrate [the dispute]" (Pet. App. A15). The court observed that the back-to-work agreement contained an express reservation of petitioner's position that the dispute over Hildabridle's discharge was not arbitrable, and it concluded that arbitration of the dispute was not required under the new contract.

2. The court of appeals took a different view of the legal issue in this case and reversed the district court (Pet. App. A1-A6). The court of appeals stated that "[w]hat is critical to the resolution of the appeal in this case is the firm recognition by the courts that they lack authority to decide at this stage of a controversy such as this whether the grievance procedure and arbitration process provided for in the new contract is applicable to Hildabridle's discharge" (*id.* at A4). The court of appeals stated that "[a]ll the Union needs to show to remove from the courts the power to decide whether this grievance is arbitrable * * * is that there is at least some possibility that it is. Whether this dispute is arbitrable under the new contract is an issue that the parties must submit in the first instance to the arbitrator" (*ibid.*).

Applying this test to the facts of the present case, the court of appeals concluded that the district court erred in refusing to issue an order compelling arbitration because "[i]t cannot be said with 'positive assurance' that the arbitration clause in the new contract cannot be applicable to this dispute" (Pet.

App. A5). The court observed that "[a]s a general rule, 'an employer may not discharge an economic striker,' " and found that "[t]o the extent that federal labor law protects his employment, therefore, the striker remains an 'employee' until the strike ends. It follows that until there is an adjudication of a company's right to fire an economic striker he remains an employee" (*id.* at A3-A4 (citations and footnote omitted)).

The court stated that in the present case, "because Hildabridle was an economic striker, and there had been no adjudication of a right to discharge him during the strike, he remained an employee. He was not effectively discharged until the company refused to reinstate him when the new contract went into effect" (Pet. App. A5). Therefore, the court concluded, "[i]t is up to the arbitrator * * * to decide in the first instance whether the grievance procedure and arbitration promise in the new contract are applicable to Hildabridle's discharge" (*ibid.*).[3] The court also found that "[t]he fact * * * that the parties themselves agreed to disagree about whether the dispute was arbitrable" was a sufficient reason to "require submission of the issue of arbitrability to the arbitrator" (*id.* at A6).

DISCUSSION

The court of appeals plainly erred in directing the parties to allow an arbitrator to decide whether their dispute is subject to arbitration. This Court held in

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[3] The court noted that the NLRB is authorized "to decide whether there was justification for firing a striker during an economic strike" (Pet. App. A5). It concluded, however, that this jurisdiction "does not bar an obligation to arbitrate the same dispute" and that the NLRB's refusal to issue a complaint in this case "is not controlling" (*ibid.*).

AT&T Technologies, Inc. v. *Communications Workers of America*, No. 84-1913 (Apr. 7, 1986), that "the court, not the arbitrator [must] decide in the first instance whether the [labor] dispute [is] to be resolved through arbitration" (slip op. 8). Thus, the court below was in error when it concluded that "[i]t is up to the arbitrator * * * to decide in the first instance whether the grievance procedure and arbitration promise in the new contract are applicable to Hildabridle's discharge" (Pet. App. A5). This Court accordingly should vacate the judgment and remand the case to the court of appeals so that it may review the merits of the district court's determination regarding the arbitrability of the parties' dispute.

Furthermore, although the Court need not reach the question in the present case, the court of appeals' limited analysis of the merits of the arbitrability question is incorrect. The court ignored the proper inquiry—whether the parties agreed to submit the dispute to arbitration—and based its finding that "[i]t cannot be said with 'positive assurance' that the arbitration clause in the new contract cannot be applicable to this dispute" (Pet. App. A5) upon an erroneous interpretation of the National Labor Relations Act. We submit that the statute is not determinative of the arbitrability issue; the question whether the dispute is arbitrable turns solely upon the meaning of the agreements between petitioner and the union.

1. In *AT&T Technologies, Inc.* v. *Communications Workers of America, supra*, this Court considered "whether a court asked to order arbitration of a grievance filed under a collective-bargaining agreement must first determine that the parties intended to arbitrate the dispute, or whether that determina-

tion is properly left to the arbitrator" (slip op. 1). The Court stated that "the question of arbitrability —whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator" (*id.* at 5). The Court noted that, "where the contract contains an arbitration clause, there is a presumption of arbitrability" (*id.* at 7), but that it remains "for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration" (*id.* at 8).

The court below plainly did not apply these principles in the present case. It stated that "[a]ll the Union needs to show to remove from the courts the power to decide whether this grievance is arbitrable under the new contract is that there is at least some possibility that it is. Whether this dispute is arbitrable under the new contract is an issue that the parties must submit in the first instance to the arbitrator" (Pet. App. A4). The court of appeals concluded that the arbitrability question in this case should be submitted to an arbitrator because it could not "say with positive assurance that the arbitration clause of [the 1982 collective bargaining agreement] is not susceptible to an interpretation that covers this dispute" (*id.* at A6).

Thus, instead of reviewing the district court's determination regarding the merits of the arbitrability issue, the court of appeals simply ascertained that there was some possibility that the dispute was arbitrable and left the arbitrator free to make the final

decision regarding the arbitrability of the dispute. The court of appeals thus permitted the arbitrator to determine his own jurisdiction, the precise result rejected by this Court in *AT&T Technologies* (see slip op. 7-8). The judgment of the court of appeals accordingly should be vacated and the case remanded so that the court of appeals may review the merits of the district court's determination regarding the arbitrability of the parties' labor dispute.

2. The court of appeals committed an additional error in this case. Although this Court need not consider the issue in view of the court of appeals' failure to reach the merits of the arbitrability question (*AT&T Technologies*, slip op. 8), we submit that the court of appeals also erred in relying upon the National Labor Relations Act to support its conclusion that the dispute regarding Hildabridle's discharge arguably is arbitrable under the 1982 collective bargaining agreement.

As a threshold matter, there is no justification for the court of appeals' apparent assumption that the definition of "employee" under the National Labor Relations Act somehow controls the arbitrability of the dispute between petitioner and the union. This Court reaffirmed in *AT&T Technologies* that " 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration" (slip op. 5 (citation omitted)).

The court of appeals did not find that the collective bargaining agreements between petitioner and the union make arbitrability dependent upon the statutory

definition of "employee" or that the agreements otherwise rely upon the meaning of the statute. The statute therefore has no bearing on the arbitrability issue in this case, and the court of appeals should have addressed the district court's determinations (see Pet. App. A11-A15) regarding the meaning of the arbitration clause contained in the 1982 collective bargaining agreement, and in the collective bargaining agreement that expired in January 1982.[4]

Instead of undertaking this inquiry, the court of appeals engaged in an erroneous analysis of the National Labor Relations Act. The court of appeals' conclusion that Hildabridle's discharge arguably is arbitrable under the 1982 collective bargaining agreement rested upon the premise that, under the National Labor Relations Act, "until there is an adjudication of a company's right to fire an economic striker [the striker] remains an employee" (Pet. App. A4). The court concluded that "Hildabridle was legally still in the status of employee when the strike ended and the new contract went into effect. The failure of the company to treat him as an employee under the new contract raised the issue of the propriety of his discharge under that agreement" (*ibid.*). Contrary to the conclusion reached by the court of appeals, however, it is well-settled that an economic striker discharged for strike-related misconduct does

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[4] In *Nolde Brothers, Inc.* v. *Local 358, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977), this Court held that a dispute over the employer's obligation to pay severance pay under the expired contract, which arose after the termination of that contract, was arbitrable under the expired contract. Respondents dispute the district court's conclusion (Pet. App. A11-A14) that the expired contract did not require arbitration in the present case (Br. in Opp. 11-15).

not remain an "employee" within the meaning of the National Labor Relations Act.

Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), provides that the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." In *NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939), this Court considered whether employees discharged for engaging in an unlawful sit-down strike remained employees within the meaning of Section 2(3) and therefore were entitled to reinstatement at the conclusion of the work stoppage. The Court held that the workers were not entitled to reinstatement. It was "unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work" (306 U.S. at 255). Instead, "[w]hen the employees resorted to [unlawful conduct unprotected under the federal labor laws] * * * they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve" (*id.* at 256-257).

As Justice Stone stated in his concurring opinion, Section 2(3) should not be read to "depriv[e] the employer of his right * * * to terminate the employer-employee relationship for reasons dissociated with the stoppage of work because of unfair labor prac-

tices. The language which saves the employee status for those who have ceased work because of unfair labor practices does not embrace also those who have lost their status for a wholly different reason—their discharge for unlawful practices which the Act does not countenance." 306 U.S. at 264; see also 29 U.S.C. 160(c) ("[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause"). Thus, a nondiscriminatory discharge effectively terminates—as of the date of the discharge—the dischargee's status as an "employee" within the meaning of the National Labor Relations Act.[5]

To be sure, it is an unfair labor practice to discriminatorily discharge an economic striker during the course of the strike and reinstatement is the appropriate remedy for that statutory violation (*NLRB* v. *International Van Lines*, 409 U.S. 48, 53 (1972)); and an unreplaced economic striker has a statutory right to reinstatement at the end of a strike unless the employer has a legitimate business justification for refusing reinstatement (*NLRB* v. *Fleetwood*

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[5] The Board has held that an employee discharged for cause during a strike is not entitled to reinstatement because, following such a nondiscriminatory discharge, the dischargee "lost his status as an 'employee' of the [employer]." *Acrylic Optics Corp.*, 222 N.L.R.B. 1105, 1106 (1976); see also *Woodlawn Hospital* v. *NLRB*, 596 F.2d 1330, 1333-1337 (7th Cir. 1979); *Dow Chemical Co.*, 212 N.L.R.B. 333, 341-342 (1974), remanded on other grounds *sub nom. United Steelworkers* v. *NLRB*, 530 F.2d 266 (3d Cir.), cert. denied, 429 U.S. 834 (1976). Contrary to the court of appeals' suggestion (Pet. App. A4), nothing in this Court's decision in *Fansteel* indicates that an adjudication of the propriety of the discharge must occur before the discharge may become effective.

Trailer Co., 389 U.S. 375, 378 (1967)). But the existence of these rights does not alter the fact that—in the absence of a reinstatement order issued by the NLRB—the nondiscriminatory discharge of a striking employee is effective at the time of the discharge.[6]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of this Court's decision in *AT&T Technologies, Inc.* v. *Communications Workers of America, supra.*

Respectfully submitted.

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MAY 1986

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[6] This conclusion is especially clear in the present case because the NLRB had an opportunity to consider the propriety of the discharge. The union filed unfair labor practice charges challenging petitioner's discharge of Hildabridle and the NLRB General Counsel declined to issue a complaint. Pet. App. A9. Thus, there was an administrative determination rejecting Hildabridle's claim to continued employee status.

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